cerned, the appellant was all along an agent, and he even wrote a letter on March 22, 1971 to the appellant to make it clear to him that he was nothing more than an agent and a broker.

The review of evidence in this case leads us to an inevitable conclusion that the appellant who obtained an option to sell the land was an agent of the vendor, whose duty was to look for a buyer. As he had difficulties in getting one, he kept on asking for extensions of the option until it was finally exercised. At one stage before it was exercised, he and the respondent had formed a partnership to buy the land and to develop it into a housing estate; but as the loan which they both applied for was not forthcoming, the partnership was abandoned and the land with the knowledge and concurrence of the appellant was finally sold to the respondent who paid for it from funds which he on his own efforts raised without involving the appellant in any financial or legal liability. After the option was exercised on July 29, 1971, he asked for a brokerage commission from the vendor, but the claim was rejected by Mr. Ernest V. Devadason, solicitors for the vendor. As a result, he wrote a letter to the respondent alleging that the latter's unilateral action had deprived him of his commission and profits and meanwhile lodged a caveat against the land and subsequently commenced the present suit, at first claiming that the land is held by the respondent on trust in his favour, and later, on trust for the partnership as a partnership property. We hold that there is no merit in this suit because —

(1) there was no agreement at all between the parties that the land was to be purchased or treated as a partnership property;

(2) the object of the firm being land development does not necessarily mean that the land must be owned by the firm in order to carry on with the business and no such term could be implied from the evidence;

(3) the land was not paid for with the funds of the partnership but the funds raised by the respondent on his own separate act independently of the appellant or of the partnership.

We therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Jayadeva & Kamal; S.M. Ratnam.*

HAJI EMBONG BIN IBRAHIM & ORS. v. TENGKU NIK MAIMUNAH HAJJAH BINTE ALMARHUM SULTAN ZAINAL ABIDIN & ANOR.

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman & Salleh Abas F.JJ.) September 1, 1979]

[Kota Bharu — Federal Court Civil Appeal No. 68 of 1975]

Islamic Law — Wakaf Khas — Validity of — Islamic Wakaf Validating Enactment Act, 1972 — Trengganu Administration of Islamic Law Enactment, 1955, s.61.

In this case the first respondent on June 13, 1961 made a document purporting to be a *wakaf* by which she made a number of dispositions in favour of her relatives and other persons with an ultimate disposition to various religious and charitable objects. Subsequently she wrote to the Commissioner of Religious Affairs, Trengganu, to revoke the *wakaf*. She also executed a document purporting to surrender her share in the Chenderong Concession to the second respondent. She then brought a suit seeking a declaration that the said purported *wakaf* was void. Harun J. in the High Court [1979] 1 M.L.J. 257 held that the *wakaf* was valid but only to the extent of one-third of the *wakaf* property. Three of the beneficiaries appealed against the decision claiming that the *wakaf* was wholly valid and that the one-third limitation only applied to a *wakaf* made by will or during death illness. The respondents on the other hand lodged a cross-appeal contending that the *wakaf* was wholly invalid.

Held, allowing the appeal: (1) the Islamic *Wakaf* Validating Enactment, 1972, has retrospective effect and applies to the *wakaf* in the present case;

(2) the *wakaf* in this case was valid as (i) it dealt not only with the income or profits from the Chenderong Concession but also the very land itself (ii) the dispositions to strangers were valid under Islamic Law and were saved by sections 2(3) of the Enactment;

(3) the one-third limitation contained in section 61 of the Administration of Islamic Law Enactment, 1955 being confined only to *wakaf* or *nazar* made by way of will and deathbed gift, has no application to the *wakaf* in the present case.

Cases referred to:-

(1) *Commissioner of Religious Affairs* v. *Tengku Mariam* [1969] 1 M.L.J. 110; [1970] 1 M.L.J. 222.

(2) *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdhury* (1894) 22 I.A. 76; I.L.R. 22 Cal. 619.

(3) *Fatumah* v. *Mohamed bin Salim* [1952] A.C. 1.

(4) *Mohamed Ahsanullah Chowdhry* v. *Amarchand Kundu* (1889) 17 I.A. 28; I.L.R. Cal. 498.

(5) *Ismail Haji Arat* v. *Umar Abdulla & Anor.* A.I.R. 1942 Bom. 155.

(6) *Hashim Ali* v. *Iffat Ara Hamidi Begum* (1942) 46 Cal. W.N. 561.

(7) *Mt. Akhtar Banu Begum* v. *Kanhaiya Lal* A.I.R. 1941 Oudh 492.

(8) *Abdul Wahab* v. *Sughra Begum* A.I.R. 1932 All 248.

(9) *Abdul Mabud Khan & Ors.* v. *Nawazish Ali Khan* A.I.R. 1925 Oudh 301.

(10) *Mt. Musharraf Begum & Ors.* v. *Mt. Sikandar Jehan Begum* A.I.R. 1928 All 516.

FEDERAL COURT.

S.T. Chung (*Joseph Tan* with him) for the appellants.

Miss Chen Kah Leng for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): This is an appeal and a cross-appeal against the decision of Harun J. on the validity of a document purported to be a *wakaf* declared by the first plaintiff on June 13, 1961. The facts of the case may be stated as follows.

On March 18, 1906, equivalent to the 22nd Muharram 1324, the late Sultan Zainal Abidin of Trengganu granted large areas of land in Kemaman known as Chenderong Concession to his daughter, the late Tengku Nik Maimunah, the first plaintiff, and her husband, Tengku Ngah Omar bin Abdul Rahim, who was then a Minister of State, in equal shares. On the death of her husband, she inherited one-fourth of the husband's share, thus increasing her share to five-eighths. The late Tengku Nik Maimunah had no children of her own. On June 13, 1961, she executed a document dedicating her total share in the Chenderong Concession into a *wakaf* in favour of the following beneficiaries: —

(1) her brothers and sisters, nieces and nephews and their children;

(2) four adopted daughters, two of whom are appellants Nos. 2 and 3;

(3) two persons who are not her blood relations, one of whom is appellant No. 1; and

(4) for religious, pious and charitable objects.

In respect of each of the dispositions to beneficiaries (1), (2) and (3), there is an ultimate disposition to the poor and the indigent. Nine years later, on July 21, 1970, the late Tengku Nik Maimunah executed another document purporting to revoke the *wakaf* and about a month later, on August 30, 1970, she executed yet another document purporting to surrender her five-eighths share of the Chenderong Concession land to a company named as Sharikat Pembinaan Chenderong Sendirian Berhad, the present respondent.

On November 26, 1970, the late Tengku Nik Maimunah commenced a civil action in the High Court, Kuala Trengganu, against Majlis Ugama dan Adat Melayu, Negeri Trengganu (in this judgment referred to as "the Majlis"), and 38 other defendants who are beneficiaries under the *wakaf*. She asked for a declaration claiming, among other things, that the document she executed on June 13, 1961 did not create a valid *wakaf*. However, on February 1, 1971, a *fatwa* by the Mufti of Trengganu stated that the *wakaf* so created was valid, and this was duly published in the Trengganu *Gazette* (G.N. 28/1971) in accordance with the requirements of section 21(3) of the Trengganu Administration of Islamic Law Enactment No. 4 of 1955. The next day, i.e. on February 2, 1971, the late Tengku Nik Maimunah withdrew her action against the Majlis, but the suit against the rest of the defendants continued. In the meantime, on April 6, 1971, the late Tengku Nik Maimunah died and the suit would have abated but for the addition of the present respondents as a second plaintiff on May 16, 1971, by an order of the court; and so proceedings continued. On July 22, 1972, Trengganu State Legislative Assembly passed an Enactment known as the Islamic *Wakaf* Validating Enactment No. 10/1972, declaring that family *wakafs* made in accordance with Islamic law are not to be held invalid merely because of certain specified grounds. This Enactment which has retrospective effect, came into force on August 8, 1972.

The trial took place on April 15, 1975 before Harun J. who gave a judgment in favour of the validity of the *wakaf* but only to the extent of one-third of *wakaf* property because of section 61 of the Administration of Islamic Law Enactment of Trengganu No. 4/1955. Three of the beneficiaries appealed against the decision claiming that the *wakaf* is wholly valid and that the one-third limitation only applies to a *wakaf* made by will or during death illness. The respondents, on the other hand, lodged a cross-appeal contending that the *wakaf* is wholly invalid.

For the purpose of our judgment, we feel it convenient to deal firstly with the question of validity of the *wakaf*, and secondly, only after this question has been answered in the affirmative, will we consider the effect and scope of section 61 of the Administration of Islamic Law Enactment No. 4/1955, in order to consider whether the validity of the *wakaf* is as whole or as to one-third of the *wakaf* property.

Wakaf is an established Islamic institution founded on religion. The Trengganu Administration of Muslim Law Enactment No. 4 of 1955 recognises two types of *wakaf*, namely *wakaf 'am* (general *wakaf*) and *wakaf khas* (special or private *wakaf*). Section 2 of the Enactment defines these two *wakafs* as follows: —

"'*wakaf 'am*' means a dedication in perpetuity of the capital and income of property for *religious or charitable purposes recognised by Islamic law*, and includes the property so dedicated.

'*wakaf khas*' means a dedication in perpetuity of the capital of property for *religious or charitable purposes recognised by Islamic law*, and includes the property so dedicated, the income of which is to be paid to a person or persons for purposes prescribed in the *wakaf*."

Amongst the operative words of these definitions are "for religious or charitable purposes recognised by Islamic law" but nowhere is this expression explained in the Enactment. This Enactment does not legislate upon the substance of Islamic law, as it merely deals with the "administration" of Islamic law. The meaning of the expression "for religious or charitable purposes recognised by Islamic law" must therefore be found elsewhere. In the *Commissioner for Religious Affairs* v. *Tengku Mariam*[1] the Mufti of Trengganu issued a *fatwa* duly gazetted under section 21 of the Enactment upholding the validity of a *wakaf* made in favour of the settlor's family and relatives with ultimate gifts for religious purposes. However, both the High Court and the Federal Court rejected the *fatwa* as being binding upon the court. Applying the decisions of their Lordships of the Privy Council in *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdhury*[2] and *Fatumah* v. *Mohamed bin Salim*,[3] Wan Suleiman J., as he then was, held that the *wakaf* was invalid. In the Federal Court its validity was saved on a narrow technical ground in that, because the beneficiaries had by their conduct previous to the suit accepted the validity of the *wakaf*, the doctrine of estoppel precluded them from challenging its validity. Nevertheless, Suffian F.J. as he then was, writing the main judgment of the court, reaffirmed as did the East African Court of Appeal in *Fatumah's* case, that the decisions of their Lordships of the Privy Council on *wakaf* were binding upon the court and suggested that the embarrassing situation should be rectified by legislation.

What then is the law as enunciated by these decisions? According to *Mohamed Ahsanullah Chowdhry* v. *Amarchand Kundu*[4] a *wakaf* for the benefits of the

settlor's family, children and descendants and for charity, will only be valid if there is a substantial dedication of the property to charitable uses at some period of time or other. In any case, such a *wakaf* will not be valid if the primary object is for the aggrandisement of the settlor's family and the gift to charity is illusory either because of its small amount or of its uncertainty or remoteness of objective (*Abul Fata's* case). This latter decision created dissatisfaction amongst the Muslim scholars and jurists in India and as a result of representations and protests, the Indian legislature passed the Mussalman Waqf Validating Act VI of 1913; and as the Act was not given retrospective effect, another validating Act was passed in 1930, thereby saving any family *wakaf* with the ultimate object for charity from invalidity irrespective of whether it was created before, on or after 1913. It was thought until recently that the decision of their Lordships in *Abul Fata's* case was purely confined to Muslim law as applied in India. However, this belief was rejected by their Lordships in *Fatumah* v. *Mohamed bin Salim* in which their Lordships re-affirmed the correctness of their decision in *Abul Fata's* case and thus cleared all doubts as to the scope of their decision being confined to India only. Their Lordships said that they

"cannot accept the theory... that the interpretation of the Mohammadan law given by this Board in a series of cases is confined to the law as applied or administered in India." (p. 14)

Such is briefly the development of Muslim law on *wakaf* in India.

Reverting to Muslim law in Trengganu, the *wakaf* law seems to follow the same course of events as it did in India. The suggestion by the Federal Court that the embarrassing situation created by the precedents of their Lordships of the Privy Council's decisions should be corrected by legislation, was accepted by the Trengganu State Assembly which subsequently on July 22, 1972, passed the Islamic Wakaf Validating Enactment No. 10 of 1972. The Enactment received the Royal Assent on August 3, 1972 and thus on that date became law. So just as in India the Privy Council's decisions on family *wakaf* were nullified by the Mussalman Waqf Validating Acts of 1913 and 1930, in Trengganu their decisions which the court considered binding in *Tengku Mariam's* case are similarly nullified by legislation, i.e. the Islamic *Wakaf* Validating Enactment 1972.

The Islamic *Wakaf* Validating Enactment 1972 does not purport to lay down what the constituent elements of a valid *wakaf* are. These, however, must be determined with reference to the definition given by section 2 of the Administration of Muslim Law Enactment No. 4 of 1955 and in turn with reference to pure Islamic law and text. What the Enactment does is merely to declare that a *wakaf* will not be held invalid merely because "among other purposes" of the *wakaf* are the following four objects, namely —

(1) that the *wakaf* is for the maintenance and support wholly or partially of the settlor's family, children or descendants, provided that there is an ultimate gift for the benefits of the poor or any other purposes recognised by Islamic Law (section 2(1)(a));

(2) that in the case of Hanafi sect, the *wakaf* is for the settlor's maintenance and support during his or her lifetime and for the payment of his or her debts out of the rents and profits of the property, provided that there is an ultimate gift for the benefit of the poor or any other purpose recognised by Islamic law (section 2(1)(b));

(3) that the ultimate benefits reserved for the poor or other purposes recognised by Islamic law is small or postponed until the total extinction of the settlor's family, children or descendants (section 2(2)); and

(4) that the *wakaf* is for the benefits of strangers, i.e. persons other than the family, children or descendants of the settlor (section 2(3)).

It is noted that a *wakaf* coming under categories (1), (2) and (3) was held invalid by the decisions of their Lordships of the Privy Council in *Ahsanullah's* case and *Abul Fata's* case, and that as regards the *wakaf* coming under category (4), i.e. *wakaf* in favour of strangers, this has never been the subject-matter of their Lordships' decision. As the Islamic *Wakaf* Validating Enactment 1972 is merely laying down the rules preventing such *wakaf* from being held invalid, the question of its validity must be, as intended by the legislature, determined in accordance with pure Islamic law and text and not one which is largely influenced by the concept of charitable trusts and rules against perpetuities in English law.

Counsel for the respondents submitted that the Islamic *Wakaf* Validating Enactment 1972 has no retrospective effect and therefore has no application to the *wakaf* in the present case which was made in 1961. Consequently, the decisions of their Lordships of the Privy Council stated above should be applicable. In our judgment, there is no merit in this submission because it is clear that section 3 of the Enactment which states —

"This Enactment shall apply to all *wakaf* created in the State before its commencement."

is retrospective. The *wakaf* created by the late Tengku Nik Maimunah was made on June 13, 1961, and therefore the Enactment which says what it means or means what it says must govern this *wakaf*. Counsel for the respondents further submitted that even if section 3 of the Enactment gives a retrospective effect to the legislation, the proviso to this section takes the *wakaf* in the present case completely outside the sphere of the Enactment. For this purpose, it is necessary to quote section 3 in detail, which is as follows: —

"3. This Enactment shall apply to all *wakaf* created in the State before its commencement:

Provided that nothing therein contained shall be deemed in any way to affect any rights, titles, obligation or liability already acquired, accrued or incurred before the commencement of this Enactment."

The proviso of this type is usually enacted in most legislations giving retrospective or current effect. For the proviso to apply, it must be shown that in a period between June 13, 1961, the date when the *wakaf* was made, and August 3, 1972, the date of the commencement of the Enactment, some rights or titles have already been acquired or accrued or some obligations or liabilities have been incurred as regards this parti-

cular *wakaf*. Our finding on this question is in the negative. According to the statement of facts of the case at page 19 of the Appeal Record, on July 27, 1970, the late Tengku Nik Maimunah wrote to the Majlis to revoke the *wakaf* and on August 30, 1970 she executed an instrument of surrender purporting to surrender her share in the Chenderong Concession to the respondents. These two acts by the settlor, in our view, did not create any right nor any obligations having been incurred. It is obvious that the very act of revoking the *wakaf* by sending a letter to the Majlis on August 30, 1970 pre-supposes her acceptance and attitude as to the validity of the *wakaf*. She must have regarded that the *wakaf* was valid, or she would not have purported to revoke it. In Islamic law, there is no question of revocation of a valid *wakaf*. Her act in executing a surrender of the property to the respondents is consequential upon the validity of her revocation of the *wakaf*. Since in Islamic law a settlor cannot revoke the *wakaf*, likewise the purported surrender of the *wakaf* property to the respondents does not give rise to rights and liabilities to anyone. In our view, the proviso to section 3 only operates as regards a *wakaf* which would have been invalid but for the Enactment where the parties or someone else had acted in such a way as to prejudice their positions. In this case, as no rights nor obligations have been acquired or incurred, we do not see any merits in the submission that the proviso operates to exclude the *wakaf* from the sphere of the Enactment.

The Islamic *Wakaf* Validating Enactment 1972, whilst preventing a *wakaf* from being held invalid on certain specified grounds, insists that "in all other respects" a *wakaf* must be "in accordance with the provisions of Islamic law". Counsel for the respondents therefore submitted that this *wakaf* is not in accordance with Islamic law and therefore invalid because it is only the income and not the corpus of the property which is dedicated. In Islamic law, for a *wakaf* to be valid the endowment must be the dedication of the capital as well as the income. In this case, what then is the subject of the *wakaf*? Counsel's submission that it is only the income which is dedicated is based on the following words of the section: —

"I endow in perpetuity all the rights, interests and income derived from the 5/8 (five-eighth) share of the said Chenderong Concession...."

This sentence, however, is an English translation rendered from the original Malay version which is —

"Saya telah mewakafkan dengan kekal-*nya menghabisi* semua hasil dan hak faedah yang didapati daripada 5/8 (lima per delapan) daripada tanah Chenderong Concession...."

Here we agree with the submission of counsel for the appellants that the English translation is not accurate as it does not give any effect to the pronoun "nya" attached to the word "kekal-nya". We also think that no effect is given to the word "menghabisi" (meaning completely or without reservation or remainder). The pronoun "nya" and the word "menghabisi" in our opinion refer to the five-eighths of the Chenderong Concession land, and that being the case, we hold that what has been dedicated or endowed is not just the income derived from five-eighths of the Chenderong Concession, but the very five-eighths of the land itself. This view is further strengthened by a clause in the *wakaf* instrument regarding the expenses of the management of the *wakaf*. Here the settlor, the late Tengku Nik Maimunah, directed that before the income is distributed to the various beneficiaries, the expenses for the management to the extent of 7/144 must be deducted from the gross income derived from "that part of Chenderong Concession that is endowed" or in Malay original "daripada tanah Chenderong Concession yang diwakafkan" (English translation at page 77, the original Jawi version at page 59 and Romanised version at page 67). It is therefore obvious that what is dedicated is not just the income or profits derived from the Chenderong Concession, but also the very land itself. Hence, we reject the submission by the counsel for the respondent.

The *wakaf* created by the late Tengku Nik Maimunah contained a long list of beneficiaries, among whom are the present three appellants. Appellant No. 1, Haji Embong bin Ibrahim, was given 3/144 shares of the *wakaf* property, whilst Appellants Nos. 2 and 3 were given 2/144 shares each. Appellant No. 1 is not related to the late Tengku Nik Maimunah, whilst Appellants Nos. 2 and 3 are her adopted daughters. It was submitted by the counsel for the respondents that the *wakaf* is invalid because as regards Appellant No. 1 the *wakaf* is made in favour of a stranger and as regards Appellants Nos. 2 and 3 it is made in favour of persons who are not members of the settlor's family. Although Appellant No. 1 is not related by blood to the late Tengku Nik Maimunah, and therefore cannot be classified as a member of her family, the disposition in his favour is clearly not to be held invalid because subsection (3) of section 2 of the Enactment enacts as follows: —

"No such *wakaf* shall be deemed to be invalid merely because part or the benefits reserved therein is given to person or persons *other than* the family, children or descendants of the person creating the *wakaf*."

This means that a *wakaf* in favour of a stranger, if valid in Islamic law, will not be held invalid. In *Ismail Haji Arat* v. *Umar Abdulla & Anor.*[5] a settlor made a *wakaf* in favour of his nephew, Hoosein Noor Mahomed, and after his death to his nephew's heirs with ultimate gifts to charity. The Bombay High Court held that Hoosein Noor Mahomed who used to reside with the settlor and was also maintained by him was a member of the family of the settlor because Hoosein Noor Mahomed passed both tests of what constitutes "a family". He was residing in the settlor's house for whose maintenance the settlor was mainly responsible and he was also connected with the settlor through a common progenitor or by having a common lineage. Therefore, a *wakaf* in his favour came within the ambit of section 3(a) of the Mussalman Waqf Validating Act 1913. The Bombay High Court, however, refused to uphold the validity of the *wakaf* made in favour of Hoosein Noor Mahomed's heir because the heir was a stranger as he was neither residing with nor depending for his maintenance upon the settlor, nor was he connected through a common progenitor with the settlor. Chagla J. who gave the judgment of the court said: —

"If I were to hold that the disposition in favour of the heirs of Hoosein Noor Mahomed is a good disposition, it would amount to my holding that the settlor would tie up his property in perpetuity in favour of persons who were neither his

children nor his descendants nor members of his family. I therefore hold that the disposition in favour of the heirs of Hoosein Noor Mahomed does not come within the purview of the Mussalman Waqf Validating Act and the disposition is therefore bad in law."

It must, however, be remembered that the Indian Mussalman Waqf Validating Act does not contain a provision similar to subsection (3) of section 2 of the Trengganu Islamic *Wakaf* Validating Enactment 1972, which prevents or saves a *wakaf* from being held invalid if otherwise valid under Islamic law merely because it is created in favour of persons other than the family, children or descendants of the person creating a *wakaf*. For this reason, *Ismail Haji Arat* v. *Umar Abdullah* cannot be an authority for the proposition that a *wakaf* to a stranger is invalid. That case simply decided on the scope of the Indian Mussalman Waqf Validating Act 1913. It is clear from the above quoted judgment, that Chagla J. was still influenced by the concept of charitable trust and the rules against perpetuities as understood in English law. Whereas in our case those rules should play no part at all in the disposition of property under Muslim law. To put the matter clear, it is sufficient to reproduce section 25 of the Civil Law Enactment 1956 which is as follows: —

"Nothing in this Part shall affect the disposal of any property according to Muslim law...."

"This Part" is Part VII of the Act and it deals with rules against perpetuities. However, this does not dispose the matter yet. The basic question has still to be answered, i.e. whether or not under the pure Islamic law and text a *wakaf* in favour of a stranger is valid. The study of works by distinguished Indian authors such as *Ameer Ali, Tyabji* and *Fyzee* shows clearly that a disposition in favour of a stranger is valid. *Fyzee*, 2nd Edition, at page 252, says: —

"...Is poverty a necessary condition for obtaining benefit from a *wakaf*?

According to Mohammadan law, *wakaf* may be made (i) for the affluent and the indigent alike; or (ii) for the affluent and thereafter for the indigent; or (iii) for the indigent alone. The law does not insist that a man must necessarily be proved to be poor before he can take the benefit of a *wakaf*. Poverty is one of the many qualities that are recognised as being capable of attracting the benefit of a *wakaf*, but it is by no means a *sine qua non*. Therefore, all persons, regardless of considerations of wealth, are entitled to come in as beneficiaries. Nevertheless, it is perfectly correct to say that when all other purposes fail, the relief of the poor is the ultimate purpose of every *wakaf*.

Thus it is clear that the objects of a *wakaf* may be different from the objects of a charitable trust as understood in English law."

Ameer Ali in Volume I, 5th Edition (1976) says that a *wakaf* may be created for the benefit of any person or class of persons or for any object of piety or charity (page 273), and among the objects of a valid *wakaf* is a gift to strangers (pages 276-277). Similarly, *Tyabji*, 2nd Edition (1919), after observing that the Mussalman Waqf Validating Act 1913 contains no reference to the question whether the provisions in favour of others than members of the family, children and descendants of the "waqif" (settlor) are valid, goes on to say that provisions in the *wakaf* may be made in favour of strangers (page 571).

In *Hashim Ali* v. *Iffat Ara Hamidi Begum*,[6] the Calcutta High Court has taken the view that the provision for a small pension for three of the faithful servants would not render the *wakaf* invalid, as the main purpose of the *wakaf* in question was not to make settlement on those servants. In *Mt. Akhtar Banu Begum* v. *Kanhaiya Lal*,[7] it was held by the Oudh High Court that payments of sums of money directed to be made in the *wakaf* to two servants of the settlor were valid, though they were not members of the family of the settlor. In the opinion of the court, the provisions contained in the Mussalman Waqf Validating Act 1913 are not exhaustive as the words used are "among other purposes". In *Abdul Wahab* v. *Sughra Begum*,[8] Allahabad High Court held that a disposition in a *wakaf* for the payment of salary and pensions to servants was valid. The court in this case acting upon the opinion of *Ameer Ali* and *Tyabji* rejected the contention that for a *wakaf* in favour of a stranger to be valid, the stranger concerned must be poor. Thus a review of Indian cases on a *wakaf* in favour of stranger shows that three High Courts, i.e. Calcutta, Allahabad and Oudh benches upheld the validity of such *wakaf*. Only Bombay High Court in *Ismail Haji Arat* v. *Umar Abdulla* held otherwise. Whatever force of the decision in this case may have, it is clear that it is inapplicable to our situation because the Indian Act contains no provision relating to validity of a *wakaf* made in favour of persons other than the family of the settlor. Thus the way is open to the judge in that case to apply the *wakaf* law coloured by the concept of charitable trust and rules against perpetuities as understood in English law, instead of the *wakaf* law as expounded and interpreted by Muslim scholars and jurists. We therefore reject the contention that a provision for Appellant No. 1 is invalid. Such provision is valid in Islamic law and further saved from invalidity by section 2(3) of the Islamic *Wakaf* Validating Enactment 1972.

As regards the dispositions in favour of the Appellants Nos. 2 and 3 who are adopted daughters of the late Tengku Nik Maimunah, in our view, such dispositions are also valid, because not only the dispositions in favour of strangers are valid, but also because adopted daughters must be regarded to be members of the settlor's family. It was contended that as Islamic law does not recognise adoption, adopted children cannot form part of the family of a settlor. In *Abdul Mabud Khan & Ors.* v. *Nawazish Ali Khan*,[9] it was held that whilst distant collaterals such as cousins in the fourth and fifth degree cannot be viewed as members of the family, the word "family" in the Mussalman Waqf Validating Act 1913 includes those persons residing in the house of the settlor for whose maintenance the settlor is mainly responsible. In *Mt. Musharraf Begum & Ors.* v. *Mt. Sikandar Jehan Begum*[10] it was held that a *wakaf* in favour of a widow's son, i.e. daughter-in-law, was valid because she was held to be a member of the settlor's family. Similarly, in *Ismail Haji Arat's* case, a nephew living in the house of the settlor who treated and maintained him as his son was held to be a member of the family. In our judgment, the test of what constitutes "family" adopted by these Indian cases is correct. It is one that we ourselves are disposed of to hold. We therefore hold that these two appellants being adopted daughters and living with the settlor must be regarded as members of the settlor's family. The disposi-

tions in their favour are valid. Even if they are not to be regarded as members of the family of the late Tengku Nik Maimunah, as strangers there is nothing in law which prevents such dispositions from being otherwise than valid. Pure Islamic law as expressed in the opinions of learned authors and as applied by a number of High Court Benches in India upholds the validity of a *wakaf* made in favour of strangers. Furthermore, section 3(2) of the Trengganu *Wakaf* Validating Enactment 1972 clearly validates such *wakaf*.

For the reasons stated above, we now hold that the *wakaf* made by the late Tengku Nik Maimunah Hajjah binti Almarhum Sultan Zainal Abidin on June 13, 1961 is valid and the cross-appeal therefore fails.

We now come to consider the appeal proper by the present three appellants. Harun J. in the court below held that the *wakaf* is valid only to the extent of one-third because section 61 of the Trengganu Administration of Islamic Enactment No. 4 of 1955 enacts as follows: —

"Whether or not made by way of will or death-bed gift, no *wakaf* or *nazar* made after the commencement of this Enactment and involving more than one-third of the property of the person making the same shall be valid in respect of the excess beyond such one-third unless expressly sanctioned and validated by the beneficiaries."

It is the contention of the appellants that this section only deals with *wakaf* or *nazar* which is made by way of will or death-bed gift and that it has no reference whatsoever to a *wakaf* or *nazar* made *inter vivos*. Consequently, in their submissions the *wakaf* in this case being made during the lifetime of the settlor must be wholly valid.

According to Islamic law, a Muslim has power during his lifetime to transfer all his property to anyone, but after his death or during his death illness in the absence of consent by his heirs, he may only do so to the extent of one-third of the property. A *wakaf* under Islamic law can be made either *inter vivos* or by way of will. An *inter vivos wakaf* takes effect immediately to divest the ownership in the property from the settlor. Consequently, the one-third limitation has no application to an *inter vivos wakaf*. But where a *wakaf* is created by will or made during the death illness of the deceased settlor, the one-third limitation applies unless such *wakaf* is consented to by the heirs. Consequently, in the absence of such consent, only the gift to the extent of one-third of the *wakaf* property is valid. Reverting now to section 61 of the Trengganu Enactment, in our view, it is clear that this Enactment never contemplates of legislating upon or changing the substance of Islamic law particularly on this point which is so basic. Far from it, as it is merely an Enactment which its long title says —

"To consolidate the law relating to the administration of all matters relating to the Religion of Islam and the religious courts."

Since by the unwritten Islamic law, the one-third limitation applies only to a *wakaf* or *nazar* made by way of will or during death illness, it can never have been the intention of the Trengganu Legislature that such one-third limitation also applies to *wakaf* made *inter vivos*, such as the one in this appeal. Furthermore, a close reading of section 61 clearly shows that it merely deals with a *wakaf* or *nazar* made by will or death-bed gift. It made no mention of a *wakaf* made *inter vivos*. The expression "whether or not made by way of will or death-bed gift" must be interpreted to mean what it says. It does not and cannot, however, refer to a *wakaf* made *inter vivos* which is not said in the expression. The general principle *expressio unius exclusio alterius* or *expressum facit cessare tacitum* must therefore apply. In view of our reasonings above, we agree with the submission of the counsel for the appellants that the *wakaf* in this case is wholly valid and that the one-third limitation contained in section 61 of the Enactment, being confined only to *wakaf* or *nazar* made by way of will and death-bed gift, has no application to the *wakaf* in the present case.

Hence we allow the appeal and dismiss the cross-appeal with costs here and the court below. The deposit has to be refunded to the appellants.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Chung & Huang; Skrine & Co.*

PACIFIC & ORIENT INSURANCE COMPANY SDN. BHD. v. WOON SHEE MIN

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. & Abdul Hamid J.) March 22 & September 8, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 217 of 1977]

Arbitration — Application to set aside award of arbitractor — Motor car insurance — Car badly damaged in accident — Arbitrator awarding damages on total loss basis — Whether award involved error of law or fact.

Insurance — Motor car damaged in accident — Arbitration — Awarding damages on total loss basis.

The respondent had taken out a comprehensive policy from the appellants insuring his car against loss or damage to the maximum sum of $10 000. The car was involved in an accident and was badly damaged. The appellants could not agree on the amount required for repair and the car was left at the repairer's shop without anything being done to it. The matter was referred to arbitration and the arbitrator awarded the sum of $8.000 on a total loss basis. The appellants sought to set aside the award of the arbitrator and their application was dismissed in the High Court. The appellants appealed.

Held: there was no mistake in law or in fact in the finding of the learned arbitrator and therefore the appeal must be dismissed.

Case referred to:-

(1) *David Taylor & Son Ltd.* v. *Barnett Trading Co.* [1953] 1 W.L.R. 562, 568.

FEDERAL COURT.

H. Ball for the appellants.

A. Lee for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): This is an appeal against the judgment of the High Court, Johore Bahru dismissing an application by the appellant company to set aside the award of the arbitrator.

The respondent had taken out a policy from the appellants, a comprehensive policy in the usual form,